

# Plant Variety Rights Act 1987 review: Issues Paper – Submission template

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I would like my submission (or specified parts of my submission) to be kept confidential, and attach my reasons and grounds under the *Official Information Act 1982* that I believe apply, for consideration by MBIE.

## Responses to Issues Paper questions

Your submission may respond to any or all of the questions from the Issues Paper. There is an additional box at the end for any other comments you may wish to make.

*Text boxes will expand as you complete them.*

### Objectives of the PVR Act

1 Do you think the objectives correctly state what the purpose of the PVR regime should be? Why/why not?

Click here to enter text.

2 Do you think the PVR regime is meeting these objectives? Why/why not?

Click here to enter text.

3 What are the costs and benefits of New Zealand's PVR regime not being consistent with UPOV 91 (e.g. in terms of access to commercially valuable new varieties, incentives to develop new varieties)? What is the size of these costs/benefits? What are the flow on effects of these costs/benefits? Please provide supporting evidence where possible.

Click here to enter text.

4 Do you think there would be a material difference between implementing a sui generis regime that gives effect to UPOV 1991 (as permitted under the CPTPP) and actually becoming a party to UPOV 91? If so, what would the costs/benefits be?

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### Farm-saved seed

5

Are there important features of the current situation regarding farm-saved seed that we have not mentioned?

[Click here to enter text.](#)

6

Can you provide any additional evidence/information that would assist us to understand this issue? For example, the nature and extent of royalties that are currently paid in different sectors, and the proportion of crops planted each year using farm-saved seed.

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7

Do you think there are problems with the current farm-saved seed arrangements? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

[Click here to enter text.](#)

8

Do you think there are benefits of the farm-saved seed arrangements? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.

[Click here to enter text.](#)

9

Do PVR owners use mechanisms outside the PVR regime to control farmers' use or saving of the seeds of their protected varieties? What are these?

[Click here to enter text.](#)

10

Do you think farmers should have to get permission from the PVR owner before sowing the farm-saved seed of a protected variety? Why/why not?

[Click here to enter text.](#)

11

What do you think the costs and benefits of a mandatory royalty scheme would be? What could such a scheme look like (e.g. should it cover all, or only some, varieties)?

[Click here to enter text.](#)

## Rights over harvested material

12

Are there important features of the current situation regarding rights over harvested material that we have not mentioned?

Yes. I have provided legal advice to the fresh produce industry in both NZ and Australia for 18 years. The rise in use of PVR's has been the outstanding feature over my time in the industry. I have been involved in PVR's for pipfruit, stone fruit, citrus, kiwifruit, berries, watermelon, tomatoes, and potatoes.

The fresh produce industry is a complex fast paced industry. On the supply side the immediate constraint is the availability of suitable land in climatically suitable regions. Significant investment is required to prepare horticultural land. There is often a considerable lag between investment and commercial returns. Fresh produce is uniquely subject to adverse weather events, while favourable conditions bring oversupply. Picking windows can be short, produce must be handled and packaged carefully and stored in temperature controlled environments. Shelf life is short. On the demand side domestically two large supermarkets chain dominate the market. Growers are price takers unless they can differentiate themselves by the unique characteristics of their produce e.g. early or late, sweeter, juicer or better keeping. Consumers want high quality, uniform produce available all year round.

PVR's are important therefore to access different areas for production; access different picking windows; provide a longer shelf life, better handling, storage; control the supply of a product to prevent oversupply; provide growers with a point of difference and as a pushback against supermarket dominance; drive innovations in packaging and handling; and provide consumers with better quality/tasting produce.

The complexity of the fresh produce industry means that no matter how good a new variety, the breeder/developer requires a commercial partner (historically a marketer) to commercialise the variety. The commercial partner will promote the variety to growers (in an increasingly crowded PVR market); organise a sufficient number of growers to plant the variety to provide sufficient volume to give credibility to the variety; provide funding to growers to plant the variety; share expertise in the growing, harvesting and handling of the variety; monitor standards of the produce of the variety; promote the unique characteristics of the variety to the consumer; develop a brand and sell the story of the variety to differentiate the produce in a commodity driven market place.

For undertaking the commercialisation of the PVR, the commercial partner will require a return on their investment. Royalties/returns for owners/developers/commercial partners of a PVR are usually calculated as a percentage of sales of the harvested material, although I have seen flat fixed royalties, royalties based on volume and royalties based on acreage. Where produce is grown from seed, e.g. watermelon or tomatoes, the return is often built into the price of the seed.

Control over harvested material is therefore important for establishing the credibility of the variety, marketing and branding the variety, providing consistent quality and ensuring a return for owners/developers, commercial partners and growers. Control over harvested material is provided contractually, the owner/developer/commercial partner will require the grower to supply the crop of the variety to an authorised marketer.

To summarise, there are good reasons for PVR's. To encourage PVR's and ensure a return to owners/developers in a complex industry, control over harvested material is important.

13 Do you agree with our definition of 'harvested material'? Why/why not?

I think that specific reference to "crops" should be made and inclusion of the examples you have given.

14 Do you think there are problems with the current scope of PVR owners' rights over harvested material? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

Yes. The fact that owners/developers/commercial partners are reliant on contractual rights for control of harvested material can lead to problems. I am aware of an example where a PVR developer trialled a PVR for a fruit with a number of growers. After successful trials the developer sought to commercialise the variety and appointed a commercial partner to commercialise the variety. The commercial partner provided plant material and granted licences to growers that required growers to have all fruit from the PVR directed to an authorised marketer. Some of the trial growers refused to sign the licence and continued to deal with the fruit outside of the arrangements of the commercial partner. This led to mixed marketing messages, an uncoordinated approach to marketing, and poor quality fruit being unloaded in the market. As a result the returns of all stakeholders were negatively affected including those growers who complied with contractual obligations.

My experience has been that when done properly control over harvested material rather than preventing growers obtaining the best price, allows them to maximise their price through branding and a coordinated approach to marketing. As an example the Deloitte Top 200 Awards 2018 Company of the Year Zespri has a statutory monopoly for a plant variety.

The two large supermarket chains provide an effective constraint on prices for NZ consumers. Where no single player controls a variety there is opportunity to drive down prices to levels which are uneconomic for growers.

To summarise the development of PVR's is time and resource intensive. Development is however only the beginning. Once developed a PVR must be commercialised. For a grower, replacing existing varieties with a PVR also takes time and money. To provide an incentive for plant breeders to develop varieties, commercial partners to commercialise varieties and growers to plant PVRs the returns to all stakeholders must be worth the investment. My experience is that control over the harvest material of the variety gives the best chance of a return for all parties.

15 Do you think there are benefits to the current scope of PVR owners' rights over harvested material? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.

[Click here to enter text.](#)

## Rights over similar varieties

16 Are there other important features of the current situation regarding distinctness that we have not mentioned?

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17 Are there other important features of the concept of EDVs that we have not mentioned?

[Click here to enter text.](#)

18 Do you think there are problems with the current approach for assessing distinctness? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

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19 Do you think there are benefits with the current approach for assessing distinctness? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.

[Click here to enter text.](#)

20 How might technological change affect the problems/benefits of the current approach for assessing distinctness that you have identified?

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21 Do you have any examples of a plant breeder 'free-riding' off a variety? How often does this happen? What commercial impact did this have? Please provide evidence where possible.

[Click here to enter text.](#)

22 Do you think there are problems with not having an EDV regime? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

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23 Do you think there are benefits of not having an EDV regime? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.

[Click here to enter text.](#)

24 How might technological change affect the problems/benefits of not having an EDV regime that you have identified?

[Click here to enter text.](#)

## Compulsory licences

25 Are there important features of the current situation regarding compulsory licences that we have not mentioned?

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26 Do you think there are problems with the current compulsory licence regime? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.

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27 Do you think there are benefits with the current compulsory licence regime? What are they? What is the size of these benefits? What are the consequences of these benefits? Please provide evidence where possible.

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## Enforcement: infringements and offences

28 Are there important features of the current situation regarding infringements and offences that we have not mentioned?

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29	Have you been involved in a dispute relating to the infringement of a PVR? How was it resolved? How was it resolved (e.g. was alternative dispute resolution used)? How effective was the process?
<a href="#">Click here to enter text.</a>	
30	How prevalent are PVR infringements and offences?
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31	Do you think there are problems with the infringement provisions in the PVR Act? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.
<a href="#">Click here to enter text.</a>	
32	Do you think there are problems with the offence provisions in the PVR Act? What are they? What is the size of these problems? What are the consequences of these problems? Please provide evidence where possible.
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### The kaitiaki relationship and the PVR Act

33	How does the current PVR regime assist, or fail to prevent, activity that is prejudicial to the kaitiaki relationship? What are the negative impacts of that activity on the kaitiaki relationship?
<a href="#">Click here to enter text.</a>	
34	What are the problems that arise from the PVR grant process, or the grant of PVR over taonga species-derived varieties more generally, for kaitiaki relationships? Please provide examples.
<a href="#">Click here to enter text.</a>	
35	What role could a Māori advisory committee play in supporting the Commissioner of PVRs?
<a href="#">Click here to enter text.</a>	
36	How does industry currently work with kaitiaki in the development of plant varieties? Do you have any examples where the kaitiaki relationship was been considered in the development of a variety?
<a href="#">Click here to enter text.</a>	

### 'Discovered' varieties

37	Are there examples of traditional varieties derived from taonga species that have been granted PVR protection? Do you consider there is a risk of this occurring?
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## Offensive names

38

What characteristics might make a variety name offensive to a significant section of the community, including Māori?

[Click here to enter text.](#)

## Transparency and participation in the PVR regime

39

What information do you think should/should not be accessible on the PVR register? Why?

[Click here to enter text.](#)

40

As a plant breeder, do you gather information on the origin of genetic material used in plant breeding?

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## Other Treaty of Waitangi considerations

41

What else should we be thinking about in considering the Crown's Treaty of Waitangi obligations to Māori in the PVR regime? Why?

[Click here to enter text.](#)

## Additional issues

42

Do you have any comments on these additional issues, or wish to raise any other issues not covered either in this section, or elsewhere in this paper?

[Click here to enter text.](#)

## Other comments

43

Are there any additional comments you wish to make about the PVR Act review Issues Paper?

[Click here to enter text.](#)